

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 RAUL O. ORTIZ MOLINA,

4 Plaintiff,

5 v.

6 RIMCO, INC.,

7 Defendant.
8

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9 **OPINION AND ORDER**

10 Plaintiff, Raúl Ortíz Molina, brings the present complaint
11 against Defendant Rimco, Inc., alleging violations of the Uniformed
12 Services Employment and Reemployment Rights Act ("USERRA"), 38
13 U.S.C. § 4301-33 (2002 & Supp. 2005), and various state laws.
14 Docket Document No. 1.

15 Defendant Rimco moves for summary judgment, averring that
16 Plaintiff has failed to establish a prima facie case of
17 discrimination under USERRA, or, alternatively, that its reason for
18 terminating Plaintiff's employment was legitimate and non-
19 discriminatory. Docket Document Nos. 125, 152. Plaintiff opposes
20 the motion. Docket Document Nos. 139, 156.

21 **I.**

22 **Factual and Procedural Synopsis**

23 Unless otherwise indicated, we derive the following factual
24 summary from the pleadings and statements of facts submitted by the
25 parties in their summary judgment and opposition motions. Docket

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1 Document Nos. 125, 137, 139, 151, 152. The procedural history of
2 the present case has been outlined in our Opinion and Order of
3 November 29, 2005, Docket Document No. 119, and we, therefore
4 confine our recitation of the facts to those relevant for summary
5 judgment purposes.

6 In August 1998, Plaintiff Ortiz was hired as a sales officer
7 by Defendant Rimco, a corporation dedicated to the renting and
8 selling of heavy machinery. In 1999, Defendant Rimco promoted
9 Plaintiff to manage a new store located in Arecibo, Puerto Rico,
10 increasing his responsibilities, salary, and offering him an annual
11 year-end bonus.

12 Plaintiff has been a member of the Puerto Rico Army National
13 Guard since 1982, and is currently ranked a Staff Sergeant.
14 Throughout his employment with Rimco, Plaintiff's National Guard
15 obligations required him to attend military training sessions one
16 weekend each month and two weeks each year. In the Fall of 2002,
17 Plaintiff's National Guard Unit received news of possible
18 activation and consequently increased its military training
19 exercises, requiring more time in service from its Guardsmen.
20 According to Plaintiff, José Ríos, the General Manager of Rimco,
21 and Orlando Maldonado, Manager of Rimco's Sales Department,
22 questioned him regarding the extra time away from Rimco, and asked
23 Plaintiff whether there was anything he could do to obviate or

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1 avoid his military duties should he be called to serve for an
2 extended period.

3 On February 14, 2003, Plaintiff's National Guard unit was
4 activated and Plaintiff was shipped to the United States to begin
5 his tour of duty. Plaintiff's military duties led him to North
6 Carolina, Germany, and Kuwait, before he was returned to Puerto
7 Rico in December 2003. During Plaintiff's absence from Rimco,
8 Emilio Morales, Sales Manager of a Rimco store located in Ponce,
9 Puerto Rico, took over Plaintiff's supervisory duties for the
10 Arecibo store.

11 On January 2, 2004, Ortiz returned to work as sales manager of
12 the Rimco Arecibo store. In March 2004, Morales resigned, and
13 Plaintiff was assigned to take over the supervisory duties of the
14 Ponce store, in addition to his existing managerial
15 responsibilities. During this time, according to Plaintiff,
16 Maldonado frequently questioned him about the possibility that
17 Plaintiff's National Guard unit would be redeployed, and repeatedly
18 asked whether Plaintiff had plans to retire from the National
19 Guard.

20 On October 13, 2004, an incident occurred involving two Rimco
21 mechanics, subordinates of Plaintiff, who stole a tool from a Rimco
22 client. Plaintiff met with Ríos and Maldonado to discuss his
23 management of the situation and to determine what action should be
24 taken against the mechanics. On October 28, 2004, Ríos informed

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1 Plaintiff that he was being terminated immediately because
2 management believed he had improperly handled the theft incident
3 and had lost faith in him.

4 On February 11, 2005, Plaintiff Ortiz, his spouse, their
5 conjugal partnership, and their minor child filed the present
6 complaint against Defendant Rimco, Ríos, and Gilberto Rivera, a
7 sales representative of Rimco. Docket Document No. 1. In August
8 2005, Ríos and Rivera reached a settlement agreement with Plaintiff
9 and his family, dismissing Plaintiffs' case against them with
10 prejudice, but leaving the case against Rimco intact. Docket
11 Document No. 90.

12 On November 29, 2005, this court granted Rimco's motion to
13 dismiss in part, Docket Document Nos. 20, 98, holding that
14 Plaintiff's spouse and minor child did not have a right to separate
15 damages under USERRA, and dismissing the portions of the original
16 complaint that sought mental and emotional damages. Docket
17 Document 129. On December 12, 2005, Defendant Rimco filed a motion
18 for summary judgment, Docket Document Nos. 124, 125, to which
19 Plaintiff replied on February 16, 2006. Docket Document Nos. 137,
20 139. Defendant filed a reply to Plaintiff's opposition on
21 March 16, 2006, Docket Document Nos. 151, 152, and Plaintiff filed
22 a surreply on April 7, 2006. Docket Document No. 156.

23 **II.**

24 **Motion for Summary Judgment Standard under Rule 56(c)**

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1 The standard for summary judgment is straightforward and
2 well-established. A district court should grant a motion for
3 summary judgment "if the pleadings, depositions, answers to
4 interrogatories, and admissions on file, together with the
5 affidavits, if any, show that there is no genuine issue as to any
6 material fact and that the moving party is entitled to a judgment
7 as a matter of law." FED. R. CIV. PRO. 56(c). A factual dispute is
8 "genuine" if it could be resolved in either party's favor, and
9 "material" if it potentially affects the case's outcome. Calero-
10 Cerezo v. United States Dep't of Justice, 355 F.3d 6, 19 (1st Cir.
11 2004).

12 The moving party carries the burden of establishing that there
13 is no genuine issue as to any material fact. See Celotex Corp. v.
14 Catrett, 477 U.S. 317, 323 (1986). However, the burden "may be
15 discharged by 'showing' - that is, pointing out to the district
16 court - that there is an absence of evidence to support the
17 nonmoving party's case." See id. at 325. The burden has two
18 components: (1) an initial burden of production that shifts to the
19 non-moving party if satisfied by the moving party; and (2) an
20 ultimate burden of persuasion that always remains on the moving
21 party. Id. at 331.

22 The non-moving party "may not rest upon the mere allegations
23 or denials of the adverse party's pleading, but . . . must set
24 forth specific facts showing that there is a genuine issue for

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1 trial," FED. R. CIV. P. 56(e), and may not simply rest upon
2 "conclusory allegations, improbable inferences, and unsupported
3 speculation." Cepero-Rivera v. Fagundo, 414 F.3d 124 (1st Cir.
4 2005) (quoting Rivera-Cotto v. Rivera, 38 F.3d 611, 613 (1st Cir.
5 1994)). Summary judgment exists "to pierce the boilerplate of the
6 pleadings and assess the proof in order to determine the need for
7 trial." Euromodas, Inc. v. Zanella, 368 F.3d 11, 17 (1st Cir.
8 2004) (citing Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794
9 (1st Cir. 1992)).

10 III.

11 Analysis

12 Congress enacted USERRA, like its predecessor, the Veterans'
13 Reemployment Rights Act (VRRA), to encourage noncareer service in
14 the military by minimizing negative repercussions in the civilian
15 workplace potentially prompted by military service. See S. Rep.
16 No. 1477 90th Cong., 2d Sess. (1968); Boyle v. Burke, 925 F.2d 497,
17 502 (1st Cir. 1991) (VRRA was enacted "to protect potential and
18 existing reservists from policies that deter employees from joining
19 the reserves."); see also Figueroa Reyes v. Hosp. San Pablo del
20 Este, 389 F. Supp. 2d 205, 211 (D.P.R. 2005) (citing Barreto v. ITT
21 World Directories, Inc., 62 F. Supp. 2d 387, 395 n.7 (D.P.R. 1999))
22 ("USERRA's legislative history established that the extensive body
23 of case law that had evolved under VRRA should remain in full force
24 and effect when interpreting the provisions of USERRA."). USERRA

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1 prohibits adverse employment actions in which the employee's
2 membership in the uniformed services is a "motivating factor" in
3 the employer's action. 38 U.S.C. § 4311(c). Figueroa Reyes, 389
4 F.Supp. 2d at 211.

5 Plaintiff alleges that after he returned from his military
6 tour of duty, Defendant Rimco violated USERRA by: (1) increasing
7 Plaintiff's work duties without increasing compensation;
8 (2) failing to give Plaintiff a raise that other sales managers
9 received; (3) subjecting Plaintiff to a hostile work environment;
10 and (4) terminating Plaintiff due to his military status. Docket
11 Document Nos. 139, 156. Defendant moves for summary judgment,
12 arguing that Plaintiff has failed to establish a prima facie case
13 under USERRA, and that Plaintiff was terminated for just cause.
14 Docket Document Nos. 125, 152. We examine each of Plaintiff's
15 claims in light of Defendant's summary judgment motion.

16 **A. Adverse Changes to Plaintiff's Work Duties**

17 Plaintiff claims that his assignment to manage Rimco's Ponce
18 store after the former manager had resigned, in addition to his
19 existing management duties for Rimco's Arecibo store, amounted to
20 a constructive demotion because his work duties were dramatically
21 increased without any corresponding change in his remuneration.
22 Docket Document No. 139.

23 For a plaintiff to establish a prima facie case of employment
24 discrimination under USERRA, and thereby survive summary judgment,

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1 he must show that his membership or participation in the uniformed
2 services was the substantial or motivating factor behind the
3 employer's adverse employment action. Figueroa Reyes, 389
4 F.Supp.2d at 212 (citing Barreto, 62 F. Supp. 2d at 391). An
5 employer may escape liability by raising the affirmative defense
6 that it would have made the same decision regardless of the
7 employee's veteran status. Id. (citing Gummo v. Village of Depew,
8 75 F.3d 98, 106 (2nd Cir. 1996)).

9 Despite not suffering any loss in wages, the increase in
10 Plaintiff's job duties due to being placed in charge of Rimco's
11 Ponce store, which resulted in a more erratic schedule and longer
12 working hours, may be considered an adverse employment action
13 prohibited by USERRA. See Carlson v. N.H. Dep't of Safety, 609
14 F.2d 1024, 1027 (1st Cir. 1979) (finding that a shift reassignment
15 requiring weekend work, night work, and longer hours constituted an
16 employment action that might deter an employee from participating
17 in the military reserves); Hill v. Michelin N. Am., Inc., 252 F.3d
18 307, 313 (4th Cir. 2001) (finding that a regular schedule is
19 "properly viewed as an advantage of the job under USERRA's
20 definition of 'benefit of employment.'"); Allen v. United States
21 Postal Serv., 142 F.3d 1444, 1447 (Fed. Cir. 1998) (concluding that
22 a position's "desirable" schedule with regular daytime hours "is an
23 'incident or advantage of employment'").

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1 Plaintiff, having established that he has suffered an adverse
2 employment action covered by USERRA, contends that the action was
3 motivated by Defendant's discriminatory intent, which can be
4 inferred by the short time between his return from military duty
5 and the change of duties, and from the fact that Plaintiff's
6 supervisors repeatedly questioned whether his military duty was
7 necessary. Docket Document No. 139. We are skeptical that these
8 actions alone suffice to discharge Plaintiff's prima facie burden
9 of showing that Defendant was motivated by a discriminatory animus
10 in assigning Plaintiff managerial duties for the Ponce store.

11 However, even if we were to assume arguendo that Plaintiff had
12 established a prima facie case, Defendant's affirmative defense
13 that it would have made the same transfer in the case of a non-
14 military manager is clearly supported by the record. Plaintiff
15 concedes that during his military tour of duty, Morales, the
16 manager of Rimco's Ponce store, was tasked with Plaintiff's
17 managerial duties for the Arecibo store. Docket Document No. 139-
18 2. There is nothing in the record to imply that Morales has any
19 connection to the uniformed services, or that he was given any
20 additional compensation for the increase in his managerial duties.

21 Defendant treated Morales, a non-military employee, in the
22 same manner as Plaintiff when it faced a managerial vacancy at one
23 of its stores. Defendant has shown that its decision regarding
24 managerial assignments was consistent regardless of a particular

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1 employee's veteran status. Therefore, Defendant's motion for
2 summary judgment as to Plaintiff's claims of adverse changes in his
3 work conditions must be granted. Docket Document Nos. 125,152.

4 **B. Lack of Raise**

5 Plaintiff next alleges that after returning from National
6 Guard duty, Defendant violated USERRA by failing to raise
7 Plaintiff's salary or award him a bonus for the years 2003 and
8 2004. Docket Document No. 139. Under USERRA, a veteran who is
9 reemployed is entitled to the seniority and other rights and
10 benefits that the person had on the date he commenced military
11 service, plus the additional seniority and rights and benefits that
12 he would have attained had he remained continuously employed. 38
13 U.S.C. § 4316(a). Plaintiff claims that since his supervisors were
14 not properly able to evaluate his performance due to the absence
15 caused by his military duties, their ultimate decision not to
16 increase his salary amounts to a USERRA violation. Docket Document
17 No. 139.

18 USERRA, however, only requires those employers who have a
19 seniority system in place to restore returning service members to
20 their proper place on the seniority ladder. Rogers v. City of San
21 Antonio, 392 F.3d 758 (5th Cir. 2004). Defendant asserts that no
22 such seniority system exists at Rimco and that salary increases or
23 bonuses are not an automatic benefit of employment. Docket Document
24 No. 152. Plaintiff's assertion that he would have been one of the

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1 managers who received a raise had he not been called to duty is
2 wholly speculative and not protected under USERRA. See Alabama
3 Power Co. v. Davis, 431 U.S. 581, 585 n.8 (1977) (stating that 9(c)
4 of the VRRRA, a parallel provision to § 4316(a) of USERRA, does "not
5 guarantee the returning serviceman a perfect reproduction of the
6 civilian employment that might have been his if he had not been
7 called to the colors. Much there is that might have flowed from
8 the experience, effort, or chance to which he cannot lay claim
9 under the statute. Section 9(c) does not assure him that the past
10 with all its possibilities of betterment will be recalled.")

11 It is conceded that no automatic escalator system was in place
12 at Rimco when Plaintiff returned to work, and as such, § 4316(a) of
13 USERRA is not applicable. Therefore, Plaintiff's claim for relief
14 based on his not receiving a pay raise upon reemployment is not
15 covered by USERRA, and must, therefore, be summarily dismissed.
16 Docket Document Nos. 125, 152.

17 **C. Hostile Work Environment Claim**

18 _____Plaintiff next claims that he was subjected to a hostile work
19 environment after he returned to Rimco from his Army Reserve duty.
20 Docket Document No. 139. USERRA prohibits the denial of "any
21 benefit of employment by an employer" to members of uniformed
22 service based on their membership and/or performance of service,
23 but "does not specifically prohibit an employer from subjecting an
24 employee to harassment or a hostile work environment due to the

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1 employee's military status." 38 U.S.C. § 4301; Figueroa Reyes, 389
2 F. Supp. 2d at 212 (internal citations omitted).

3 While some courts in other districts have held that hostile
4 work environment claims are cognizable under USERRA, the First
5 Circuit has remained silent on the issue. See e.g., Petersen v.
6 Dep't of Interior, 71 M.S.P.R. 227 (1996) (finding that harassment
7 based upon prior military service violated USERRA); Vickers v. City
8 of Memphis, 368 F. Supp. 2d 842 (D. Tenn. 2005) (noting the absence
9 of district or appellate court precedent on the issue of "whether
10 freedom from a hostile work environment is contemplated within the
11 term 'benefit of employment' in the USERRA"; finding the Merit
12 Systems Protection Board's findings in Petersen persuasive and
13 adopting its conclusion that the USERRA provides a cause of action
14 for harassment); cf. Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609,
15 614 (1st Cir. 1996) ("VRRRA § 2021 (b)(3) is designed to deter
16 discriminatory employment actions like discharge and demotion")
17 (internal citations excluded).

18 In the case at hand, Plaintiff's hostile work environment
19 claims allege that he was repeatedly questioned about his military
20 duties, his supervisory authority over his employees was diminished
21 by other Rimco employees, and decisions he made were questioned or
22 ignored by fellow employees. Docket Document No. 139. As in
23 Figueroa Reyes, we feel that even accepting arguendo that hostile
24 work environment claims are cognizable under USERRA, there is no

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1 support for such a claim in the present case. 389 F. Supp. 2d at
2 212.

3 To assert a hostile work environment claim under an analogous
4 federal statute, such as Title VII of the Civil Rights Act of 1964
5 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. 2003),
6 the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.
7 §§ 621-634 (1994 & Supp. 2003), or the Americans with Disabilities
8 Act ("ADA"), 42 U.S.C. §§ 12131-12165 (1994 & Supp. 2003), a
9 plaintiff must "show that [he] was subjected to severe or pervasive
10 harassment that materially altered the conditions of [his]
11 employment." Noviello v. City of Boston, 398 F.3d 76, 92 (1st Cir.
12 2005). In a hostile work environment inquiry, we consider "the
13 frequency of the discriminatory conduct; its severity; whether it
14 is physically threatening or humiliating, or a mere offensive
15 utterance; and whether it unreasonably interferes with an
16 employee's work performance." Faragher v. City of Boca Raton, 524
17 U.S. 775, 787-88 (1998); see also Patterson v. McLean Credit Union,
18 491 U.S. 164 (1989) (Title VII precludes "harassment that is
19 sufficiently severe or pervasive to alter the conditions of
20 employment and create an abusive working environment"). In
21 characterizing the negative workplace environment, courts have
22 drawn a continuum between rudeness and ostracism, on one side of
23 the spectrum, and severe or pervasive harassment on the other side,
24 generally finding that "rudeness or ostracism, standing alone" is

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1 insufficient to support a hostile work environment claim and that
2 severe or pervasive harassment is actionable. Noviello, 398 F.3d at
3 92; Simas v. First Citizens' Fed. Credit Union, 170 F.3d 37, 52
4 n.12 (1st Cir. 1999).

5 Plaintiff's contention that he was frequently questioned about
6 his military status, its necessity, and whether he could avoid
7 future service commitment may be probative of the fact that
8 Plaintiff's military status concerned his managers, but the
9 comments alone do not rise to the severity and pervasiveness
10 necessary to sustain a hostile work environment charge. See e.g.
11 Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 509 (5th Cir.
12 2003) (finding that a disabled employee who was told by her
13 employer that "she better get better this time" and that he would
14 "no longer tolerate her health problems" was not subjected to a
15 hostile work environment under the ADA); McConathy v. Dr.
16 Pepper/Seven-Up Corp., 131 F.3d 558, 564 (5th Cir. 1998) (finding
17 that an employer's boorish behavior toward an employee regarding
18 the slow pace of the employee's recovery from a disease, his
19 reassignment of work away from her, and his insensitivity toward
20 her need for surgery and time to recuperate was not sufficient as
21 a matter of law to state a claim of hostile environment
22 harassment).

23 Plaintiff additionally alleges that other managers at Rimco,
24 on occasion, gave orders to employees who were under his

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1 supervision, and also claims that his input was not valued or
2 considered on certain occasions. Docket Document No. 134. While
3 Plaintiff may sincerely have been bothered by these actions, which
4 he claims undermined his managerial role within the organization,
5 Plaintiff's claims clearly fail to describe conduct so severe or
6 pervasive that a reasonable person would find it hostile or
7 abusive. Figueroa Reyes, 389 F. Supp. 2d at 213. "Work places are
8 rarely idyllic retreats, and the mere fact that an employee is
9 displeased by an employer's act or omission" does not elevate that
10 act to an actionable harm. Blackie v. Maine, 75 F.3d 716, 725 (1st
11 Cir. 1996). Plaintiff has failed to meet his burden required to
12 establish a valid hostile work environment claim, and consequently,
13 we must grant Defendants' motion for summary judgment as to that
14 portion of the complaint. Docket Document Nos. 125, 152.

15 **D. Wrongful Termination**

16 Plaintiff's final claim alleges that his termination from
17 employment was motivated in part by his membership in the National
18 Guard. Docket Document Nos. 139, 156. Defendant asserts that
19 Plaintiff was terminated from his position solely based on the
20 handling of a theft incident and that Plaintiff would have been
21 terminated from his position regardless of his military status.
22 Docket Document No. 125.

23 Section 4316(c) of USERRA provides that "a person who is
24 reemployed by an employer shall not be discharged from such

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1 employment, except for cause within one year after the date of such
2 reemployment, if the person's period of service before the
3 reemployment was more than 180 days." 38 U.S.C. § 4316(c).
4 "Cause" as used in Section 4316(c) is not defined in USERRA, but it
5 is to be liberally construed and strictly enforced for the benefit
6 of those who left private life to serve their country. Alabama
7 Power Co., 431 U.S. at 581; H.R.Rep. No. 103-65 (1993); Duarte v.
8 Agilent Techs., 366 F. Supp. 2d 1039, 1046 (D. Colo. 2005). The
9 test which must be applied is whether or not the discharge by the
10 employer was a reasonable one under the circumstances. Duarte, 366
11 F. Supp. 2d at 1046 (citing Kemp v. John Chatillon & Sons, Inc.,
12 169 F.2d 203, 206 (3d Cir. 1948)).

13 Defendant asserts that Plaintiff was terminated because of his
14 poor supervision of two Rimco employees who stole a tool from a
15 Rimco client. Docket Document Nos. 125, 152. According to
16 Defendant, Plaintiff was aware that Javier Vélez, one of the
17 employees Plaintiff was tasked with supervising, had intentionally
18 stolen a tool from a Rimco client, but hid this information from
19 his own supervisors and led them to believe that the tool was taken
20 by mistake. Docket Document No. 125. Plaintiff denies that he
21 misled his supervisors, and points out that Maldonado was involved
22 in the theft investigation and had access to the same information
23 as Plaintiff. Docket Document No. 139. Plaintiff further contends
24 that non-military employees of Rimco have committed far worse acts

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1 than Plaintiff - including appropriating checks meant for another
2 party, and causing a motor vehicle accident that resulted in
3 substantial property loss - that did not result in their
4 termination. Id.

5 The issue at hand is whether Plaintiff's handling of the theft
6 incident caused his termination or whether Plaintiff's National
7 Guard membership substantially influenced Defendant's decision.
8 Figueroa Reyes, 389 F. Supp. 2d at 212. "When an employer
9 articulates a reason for discharging the plaintiff not forbidden by
10 law, it is not the court's province to decide whether the reason
11 was wise, fair, or even correct, ultimately, so long as it truly
12 was the reason for the plaintiff's termination." Hill v. Michelin
13 N. Am., Inc., 252 F.3d 307 (4th Cir. 2001). However, given the
14 persistent questioning of Plaintiff regarding his military duties
15 and whether he could abandon them, a triable issue of fact has been
16 raised as to Defendant's true motivation in terminating Plaintiff.
17 Given that USERRA and its predecessor statutes are to be liberally
18 construed for the benefit of those who left private life to serve
19 their country, we must leave the question of Defendant's intent in
20 terminating Plaintiff for a jury to decide. Alabama Power Co., 431
21 U.S. at 584. As such, Defendant's motion for summary judgment is
22 denied. Docket Document No. 125.

23 **IV.**

24 **Conclusion**

